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**Supreme Court of the United States**

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OCTOBER TERM, 1943.

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No. 700

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NORMAN G. BAKER, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN, UNITED STATES  
PENITENTIARY, LEAVENWORTH, KANSAS,  
RESPONDENT.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT, AND SUPPORT-  
ING BRIEF.**

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### **Index to Petition for Certiorari**

I. Summary Statement of the Matters Involved.....	1
II. Basis of Jurisdiction.....	3
III. Questions Presented.....	4
IV. Reasons Relied Upon for Allowance of Writ.....	5
Prayer .....	7



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To the Honorable Chief Justice, and to the Associate  
Justices of the Supreme Court of the United States:

**I. SUMMARY STATEMENT OF MATTERS  
INVOLVED.**

This case challenges the validity of Rule 5 of the  
rules adopted by the Supreme Court as the rules of  
practice and procedure in all proceedings in criminal cases  
after verdict of guilty (7 F. C. A., p. 431).

Petitioner has been illegally imprisoned since February 23, 1943. To avoid further illegal imprisonment, this case is brought to this Court under Sec. 347 of Title 28, F. C. A., **before decision** of the case by the Circuit Court of Appeals from the Tenth Circuit in which it is pending on appeal from the United States District Court for the District of Kansas.

Action for release on habeas corpus was brought in said District Court on or about July 30, 1943, alleging that Petitioner was wrongfully imprisoned by the Warden of the United States Penitentiary at Leavenworth after having legally completed on February 23, 1943, the service of the sentence for which he was committed.

Hearing was delayed by the regrettable death of Judge Hopkins, and on October 19, 1943, Judge Huxman, sitting as the District Court of Kansas, heard the case and entered judgment discharging the writ and refusing relief to Petitioner (Rec. 21). On December 1, 1943, Petitioner perfected his appeal to the United States Circuit Court of Appeals for the Tenth Circuit (Rec. 21).

The case apparently cannot be reached before the May, 1944, Term of the Tenth Circuit Court of Appeals. To await the decision of that court before issuing certiorari would render the remedy by certiorari of no value.

The validity of Rule V of the rules for criminal cases after verdict is questioned, and should be passed upon by this Court which made the rules.

The gist of the question is whether Petitioner, whose service of sentence to four years imprisonment in the penitentiary, was commenced on January 25, 1940, by imprisonment without his request or consent, in a county jail to which he had been delivered by the marshal **to await transportation to the penitentiary**, and where he was so imprisoned for one year and two months, can law-

fully be imprisoned in the penitentiary four more years after affirmance of the judgment on appeal. Petitioner asks to have applied upon his sentence the year and two months service of sentence in county jails while awaiting transportation to the penitentiary.

The case necessitates clarification of the hazy line between substantive and procedural law and the determination whether Rule V of the said rules is void as substantive or is merely procedural and valid, also whether it is void because not authorized by Sec. 688 of Title 18, F. C. A. It involves the applicability of Sections 1 and 8 of Article I of the Constitution to Rule V and necessitates construction and interpretation of Sections 688 and 709a of Title 18 of the United States Code.

The controversy is one of law only. There is no dispute as to the facts. They are alleged in the petition (Rec. 4).

They are **admitted** by the demurrer (Rec. 17), and by stipulation at the close of the hearing. The facts are set out in the accompanying brief, pp. 9-13.

## II. BASIS OF JURISDICTION.

This is a petition for writ of certiorari to review the judgment and decree of the United States District Court for the District of Kansas prior to the decision on appeal by the United States Circuit Court of Appeals for the Tenth Circuit where said appeal is now pending, and prior to the hearing or submission of the case in the appellate court (Sec. 204a, Judicial Code as Amended).<sup>1</sup>

<sup>1</sup>Sec. 347, Title 28, F. C. A.:

"(a) In any case, civil or criminal, in a circuit court of appeals, \* \* \* it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari,

The case comes within the specific provisions of said statute.

*Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160.

*U. S. v. Three Friends*, 166 U. S. 1, 41 L. Ed. 897-913.

### III. QUESTIONS PRESENTED.

The questions urged for decision of this Court are:

1. Whether by the terms and provisions of Sec. 709a of Title 18, F. C. A., Petitioner's **service** of his sentence **commenced as a matter of law** on January 25, 1940, at the time the United States Marshal, in executing the commitment under which Petitioner is now imprisoned, incarcerated Petitioner in the county jail at Little Rock to **await transportation** to the penitentiary at Leavenworth.

2. Whether Rule V of the rules adopted by the Supreme Court prescribing procedure and practice after verdict in criminal cases, embraces a matter of substantive law which only Congress had power to enact (Const., Art. I, Secs. 1-8) and is therefore unconstitutional and void and could not cause Petitioner's appeal to the Eighth Circuit Court of Appeals to stay or interrupt service of Petitioner's sentence theretofore commenced.

3. Whether the provisions of Sec. 688 of Title 18, F. C. A., by expressly providing that "the rules made as

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either **before** or after the judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal. \* \* \*

(March 3, 1891, Ch. 517, Sec. 6, 26 Stat. 823; March 3, 1911, Ch. 231, Sec. 240, 36 Stat. 1157; February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 933, January 31, 1923, Ch. 14, Sec. 1, 45 Stat. 54; June 7, 1934, Ch. 426, 48 Stat. 926.)"



herein authorized may prescribe the times for and the manner of taking appeals \* \* \* and the conditions on which supersedeas or bail may be allowed," impliedly withheld from the Supreme Court the power to make a rule to stay execution of a judgment in any way other than by an order of court allowing bail pending appeal, or an order recalling an outstanding commitment under which service of sentence had been commenced.

4. Whether Exhibit II (Rec. 18) had the legal effect of suspending the service of Petitioner's sentence during the time he was incarcerated in the county jails, neither the statutes nor rules applicable to the case making any provision for such an election and Petitioner having no authority to change the law as to service of sentence nor to modify the duties of the marshal as to executing the commitment in question.

5. Whether adding one year and two months' imprisonment in jail to the punishment of four years in the penitentiary to which Petitioner was sentenced, is so manifestly unjust and so abhorrent to an enlightened sense of justice that Congress will not be held to have intended such a result by Sec. 688, Title 18, F. C. A.

#### **IV. REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.**

This case presents for the first time important questions as to the constitutionality and as to the interpretation of Rule V of the rules adopted by the Supreme Court of the United States for practice and procedure after verdict in criminal cases in the United States district courts and other courts. It presents for the first time an important question as to the construction of Sec. 688 of Title 18, F. C. A. (February 24, 1933, Ch. 119, Secs. 1 to 3, 47 Stat.

904; March 8, 1934, Ch. 49, 48 Stat. 399; June 7, 1934, Ch. 426, 48 Stat. 926).

An early authoritative decision on these questions is of pressing importance to Petitioner because he has already been imprisoned for approximately eleven months after completing the service of his sentence as required by law. Relief from this flagrant violation of his constitutional rights to liberty will be lost if he is subjected to the delay necessary to reach a decision of his appeal by the Tenth Circuit Court of Appeals before application for certiorari is allowed by this Court.

This Court has declared that the boundary line between substantive law and procedural rules is hazy. The public interest will be promoted by clarification of that boundary line to throw light upon the principles to be applied by the courts in other cases, and by the Advisory Committee now at work on new rules of procedure for criminal cases. Similar questions exist as to many other prisoners and this Court is the only court which can pass upon the validity and interpretation of said rule without embarrassment.

This cause was brought and proceeded to judgment in the District Court of Kansas and aside from the novelty and importance of the issues presented, the case should be reviewed for the additional reason that the decision of the District Court was clearly erroneous and not in accord with the principles of applicable decisions of this Court—among others

*Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. Ed. 448.

*Williamson v. U. S.*, 207 U. S. 425, 52 L. Ed. 278.

*Sibbach v. Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479.

*Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 397, 84 L. Ed. 1263, 1273.

*Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160.

*U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516.

Also because of the difference of opinion of the Circuit Court Judges themselves as illustrated in *Aderhold v. Ellis*, 81 F. 2d 543 and the conflict between the decisions of various circuit courts and the Supreme Court of the United States, as shown by *Dimmick v. Tompkins*, 194 U. S. 540, 48 L. Ed. 1110; *Mosheik v. Bates*, 87 F. 2d 211; *Moss v. U. S.*, 72 F. 2d 30, and *Shifflett v. Hiatt*, 50 F. Supp. 415; *Baker v. U. S.*<sup>2</sup>

Petitioner further alleges that since the taking of said appeal to the Tenth Circuit Court of Appeals and the transmission to that court of the transcript of the record of the District Court of Kansas herein, Appellant has, by the lapse of time, completed his full term of imprisonment under the judgment and sentence in question, said four year term having expired on the 24th of January, 1944.

Wherefore, Your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain therein to be named, a transcript of the record and proceedings herein and that the judgment and order of the United States District Court for the District of Kansas, pending on said appeal to the Tenth Circuit Court of Appeals, be reversed; that it be adjudged that Appellant had completed service of his sentence as required by law, on the 23rd day of

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<sup>2</sup>8th Circuit Court of Appeals, Motion to Correct Commitment overruled January 8, 1944; Petition for Rehearing Denied January 29, 1944; Opinion not yet Published, but review in this court is intended.

February, 1943; that Appellant, on January 24, 1944, fully completed service of his sentence in question without regard to any allowance for good behavior and is now entitled to unconditional release; that an order be made for the immediate and unconditional release and discharge of Appellant; and that your Petitioner have such other and further relief in the premises as to this Court may seem meet and just.

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